

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

VOULA PAPPAS and CHRISA PAPPAS,

Plaintiffs,

v.

STARWOOD HOTELS & RESORTS
WORLDWIDE, INC.,

Defendant.

CIV-S-05-717 DFL GGH

MEMORANDUM OF OPINION
AND ORDER

Defendant Starwood Hotels & Resorts Worldwide, Inc.

("Starwood") moves to dismiss the negligence claims of plaintiffs Voula Pappas ("Voula") and Chrisa Pappas ("Chrisa") (collectively "plaintiffs") on four grounds: (1) forum non conveniens; (2) failure to sue a proper defendant; (3) failure to state a claim; and (4) lack of subject matter jurisdiction.

For the reasons stated below, the court: (1) DENIES Starwood's motion to dismiss for forum non conveniens; (2) DENIES Starwood's motion to dismiss for failure to sue a proper defendant; (3) DENIES Starwood's motion to dismiss plaintiffs' claim for negligence; (4) GRANTS Starwood's motion to dismiss plaintiffs' claim for negligent infliction of emotional distress

1 ("NIED") and deems the claim part of plaintiffs' negligence
2 claim; and (5) DENIES Starwood's motion to dismiss for lack of
3 subject matter jurisdiction.

4 I.

5 Plaintiffs are a mother and daughter, both residents of
6 California, who traveled to Greece. (FAC at 2.) On August 26,
7 2003, plaintiffs stayed at the Hotel Grande Bretagne in Athens,
8 Greece. (Id.) That night, while plaintiffs slept, they allege
9 that someone entered their room and stole \$15,000 from Voula's
10 purse. (Id.) Plaintiffs claim the thief gained access to their
11 room through a defective door lock. (Id.)

12 On April 13, 2005, plaintiffs brought this suit against
13 Starwood. On September 14, 2005, plaintiffs filed a first
14 amended complaint ("FAC"). Plaintiffs allege that the Hotel
15 Grande Bretagne is a Starwood "facility" managed by Starwood.
16 (Id.) Plaintiffs allege that Starwood was negligent in
17 "constructing, maintaining, managing, designing, and otherwise
18 providing a purportedly safe environment." (Id.) As a result of
19 Starwood's negligence, plaintiffs claim that they have suffered
20 emotional distress and a "severe shock to their nervous systems."
21 (Id. at 3-5.)

22 Based on these allegations, plaintiffs bring two causes of
23 action: (1) negligence; and (2) NIED. (Id.) Under the
24 negligence claim, Voula seeks damages for the \$15,000 taken from
25 her purse. (Id. at 3.) Under the NIED claims, each plaintiff
26 seeks general damages in excess of the minimum jurisdictional

limits of the court. (Id. at 4-5.)

II.

A. Forum Non Conveniens

Starwood argues that plaintiffs' suit should be dismissed because Greece provides a more convenient forum. (Mot. at 9.) A court may decline to exercise jurisdiction in a case where litigation in a foreign forum would be more convenient for the parties. Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 504, 67 S.Ct. 839 (1947). When considering a motion to dismiss under forum non conveniens, a court must examine: "(1) whether an adequate alternative forum exists; and (2) whether the balance of private and public interest factors favors dismissal." Luek v. Sundstrand Corp., 236 F.3d 1137, 1142 (9th Cir. 2001). To make its determination, a court may consider declarations outside the pleadings. U.S. Vestor, LLC v. Biodata Info. Tech. AG, 290 F.Supp.2d 1057, 1062 n.1 (N.D. Cal. 2003) (citing AT & T v. Compagnie Bruxelles Lambert, 94 F.3d 586, 589-591 (9th Cir. 1996)).

Under the first part of the test, "[t]he defendant bears the burden of proving the existence of an adequate alternative forum." Cheng, 708 F.2d at 1411. An adequate alternative forum ordinarily exists when: (1) the defendant is amenable to service of process in the foreign forum; and (2) the foreign forum provides the plaintiff with some remedy for his wrong. Luek, 236 F.3d at 1143. However, even if there is an adequate alternative forum, "[o]rdinarily, a plaintiff's choice of forum will not be

1 disturbed unless the 'private interest' and the 'public interest'
2 factors strongly favor trial in a foreign country." Id. at 1145
3 (citation omitted). In addition, a plaintiffs' choice of forum
4 is entitled to greater deference when he chooses his home forum.
5 Id. at 1143 (citation omitted).

6 Following oral argument, Starwood submitted an additional
7 declaration suggesting Greece provides an adequate alternative
8 forum. (See Rodriguez Decl.) However, Starwood has not shown
9 that the public and private interest factors strongly favor trial
10 in Greece. Starwood's briefing contains no discussion of
11 possible public interest factors, nor choice of law.¹ At present
12 it appears that many of the liability witnesses reside in Greece
13 while the damage witnesses -- plaintiffs' treating doctors --
14 reside in this district. If further discovery demonstrates that
15 Sacramento is an inconvenient forum, then the court will permit
16 Starwood to renew the motion. Therefore, the court DENIES
17 Starwood's motion to dismiss for forum non conveniens without
18 prejudice to its renewal.

19 B. Wrong Defendant

20 Starwood argues that plaintiffs sued the wrong defendant
21 because Starwood does not manage or own the Hotel Grande
22 Bretagne. (Mot. at 4.) Instead, Starwood alleges that CIGA, a
23 Greek corporation, operates and manages the hotel. (Id. at 5.)
24

25 ¹ The court notes that Starwood provided a cursory analysis
26 of the choice of law issue in a supplemental brief. (See Def.'s
Reply to Pls.' Obj. to Decl. Rodriguez.) However, plaintiffs did
not have an opportunity to respond.

1 Starwood licensed its trademarks to CIGA, and CIGA is a wholly-
2 owned fourth-tier subsidiary of Sheraton International, Inc.,
3 which is a third-tier subsidiary of Starwood. (Id.) Starwood
4 argues because it is a corporate parent, it cannot be liable for
5 the acts of its subsidiary, CIGA. (Id. at 6.)

6 In response, plaintiffs argue that Starwood is liable for
7 CIGA's negligence under a theory of ostensible agency. (Opp'n at
8 6.) They claim that Starwood's website suggests that Starwood
9 owns and operates the hotel. (Id.)

10 In support of their respective arguments, both parties have
11 cited to declarations and evidence outside the FAC. Starwood
12 cites a number of declarations to establish that it does not
13 manage or operate the hotel. (Mot. at 4-6.) Similarly,
14 plaintiffs base their ostensible agency argument on the contents
15 of a website that was not attached to, or mentioned, in their
16 complaint.

17 However, on a motion to dismiss brought under Fed. R. Civ.
18 P. 12(b)(6), the court may look only to the facts alleged in the
19 pleadings, documents attached to the pleadings, or matters of
20 which the court takes judicial notice. See Lovelace v. Software
21 Spectrum Inc., 78 F.3d 1015, 1017-18 (5th Cir. 1996). Of course,
22 the court could convert the motion to a summary judgment motion.
23 See Rule 12(b)(6). The court declines to do so here because the
24 briefing is not adequate. In particular, the briefs do not
25 address whether Greek or California law applies. Moreover,
26 Starwood assumes that plaintiffs are claiming that Starwood is

1 the principal and the hotel is the ostensible agent. However,
2 according to plaintiffs, it is the other way around.
3 Accordingly, Starwood's briefing is not directed to plaintiffs'
4 theory of the case. Therefore, the court DENIES Starwood's
5 motion to dismiss Starwood as the wrong defendant with leave to
6 renew on a motion for summary judgment.

7 C. Failure to State a Claim

8 Starwood moves to dismiss plaintiffs' claims for: (1)
9 negligence; and (2) NIED.

10 1. Negligence

11 Starwood argues that plaintiffs cannot state a claim for
12 negligence because Starwood is not the appropriate defendant.
13 (Mot. at 11.) As discussed above, the court cannot resolve that
14 issue on this motion. Therefore, the court DENIES Starwood's
15 motion to dismiss plaintiffs' claim for negligence.

16 2. NIED

17 Starwood argues that plaintiffs' claims for NIED should be
18 dismissed because California courts do not recognize NIED as an
19 independent tort. In addition, it argues that plaintiffs cannot
20 recover for their emotional distress because: (1) Starwood's
21 alleged negligence was not outrageous; and (2) Chrisa Pappas
22 cannot recover under a bystander theory. (Mot. at 11-12.)

23 a. NIED

24 Under California law, there is no independent tort of NIED.
25 See Potter v. Firestone Tire & Rubber Co., 6 Cal.4th 965, 984
26 (1993); Lawson v. Mgmt. Activities, Inc., 69 Cal.App.4th 652, 656

1 (1999). Rather, NIED is simply a form of negligence, and NIED
2 claims must satisfy the traditional elements of duty, breach,
3 causation, and damages. Lawson, 69 Cal.App.4th at 656.
4 Therefore, plaintiffs' separate claims for NIED are included in
5 their claim for negligence, and their damages for emotional
6 distress should be pleaded under that cause of action. The court
7 will deem the separate claim for NIED as a claim for emotional
8 distress damages due to defendant's negligence.

9 b. Damages for Emotional Distress

10 i. Outrageous Conduct

11 Starwood argues that plaintiffs cannot recover for emotional
12 distress because Starwood's alleged negligence was not
13 "outrageous." (Mot. at 12.) In support of its argument,
14 Starwood cites to Bro v. Glaser, 22 Cal.App.4th 1398 (1994). In
15 Bro, the court held that a defendant's conduct must be
16 "outrageous" for the plaintiff to recover for emotional distress
17 caused by negligence. Id. at 1441. In addition, it found that a
18 court could rule as a matter of law that defendant's conduct was
19 not outrageous enough to constitute negligence. Id. Under Bro,
20 Starwood argues that a negligently defective doorlock is not
21 outrageous conduct as a matter of law. (Mot. at 12.)

22 However, numerous courts have rejected Bro's requirement of
23 outrageous conduct. See Wooden v. Raveling, 61 Cal.App.4th 1035,
24 1046 (1998) (finding Bro's outrageous conduct element
25 inconsistent with existing law that defines NIED as a form of
26 negligence); Mercado v. Leong, 43 Cal.App.4th 317, 327 (1996)

1 (rejecting Bro's use of the outrageous conduct element). In
2 addition, the California Supreme Court has not recognized
3 outrageous conduct as an element of NIED. See Potter, 6 Cal.4th
4 at 985. Therefore, the court rejects Starwood's argument that
5 plaintiffs cannot recover damages for their emotional distress
6 without showing that Starwood acted outrageously.

7 ii. Bystander Claim

8 Starwood also moves to dismiss Chrisa's claim for emotional
9 distress because she fails to plead the elements of a bystander
10 claim. (Mot. at 12.) However, Chrisa did not raise a bystander
11 claim. "Bystander cases are cases in which the plaintiff was not
12 physically impacted or injured, but instead witnessed someone
13 else being injured due to defendant's negligence." Wooden, 61
14 Cal.App.4th at 1037. Here, Chrisa alleges that Starwood caused
15 her emotional distress by allowing someone to enter her hotel
16 room while she slept. (FAC at 2,5.) She does not claim that she
17 suffered emotional distress by witnessing an injury to Voula.

18 Although plaintiffs cannot bring a separate tort for NIED,
19 Starwood has failed to show that they cannot recover for their
20 emotional distress. Therefore, the court GRANTS Starwood's
21 motion to dismiss plaintiffs' NIED claims and will deem the
22 complaint amended to include a prayer for emotional distress
23 damages as part of the negligence claim.

24 D. Subject Matter Jurisdiction

25 Starwood argues that plaintiffs cannot meet the amount in
26 controversy requirement for two reasons: (1) their monetary

1 losses under California law and Greek law are limited; and (2)
2 their emotional damages do not exceed \$75,000. (Mot. at 15;
3 Reply at 6-7.)

4 District courts have jurisdiction in civil cases where there
5 is complete diversity of citizenship among the parties and the
6 amount in controversy exceeds \$75,000. 28 U.S.C. § 1332(a).
7 Generally, the amount in controversy is determined from the face
8 of the complaint. Crum v. Circus Circus Enter., 231 F.3d 1129,
9 1131 (9th Cir. 2000). The amount claimed by the plaintiff in the
10 complaint controls so long as it is made in good faith. Id. "To
11 justify dismissal, 'it must appear to a legal certainty that the
12 claim is really for less than the jurisdictional amount.'" Id.
13 (citations omitted).

14 1. Innkeeper Statutes

15 First, Starwood argues that plaintiffs' recovery is limited
16 by: (1) California Civil Code section 1859; or (2) Greek Article
17 8 of Law 1652/1986. (Mot. at 15.) However, even if California
18 and Greek law limit plaintiffs' recovery of their lost money,
19 they still plead damages for emotional distress.

20 2. Damages for Emotional Distress

21 Starwood argues that plaintiffs' damages for emotional
22 distress do not satisfy the \$75,000 requirement. (Mot. at 15.)
23 Under their claims for NIED, plaintiffs allege that their
24 "injuries will result in some permanent disability . . . [and]
25 damage[s] . . . in excess of the minimum jurisdictional limits of
26 the court" (FAC at 4-5.)

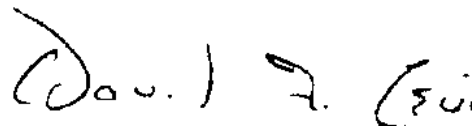
1 Although the claim of permanent injury may be difficult to
2 prove, and may fall out on a summary judgment motion, the
3 allegation of permanent disability suffices to establish the
4 jurisdictional amount at this juncture. Because Starwood has
5 failed to show to a legal certainty that plaintiffs' claim is for
6 less than the jurisdictional amount, the court DENIES Starwood's
7 motion to dismiss the case for lack of subject matter
8 jurisdiction.

9 III.

10 For the reasons stated above, the court: (1) DENIES
11 Starwood's motion to dismiss for forum non conveniens; (2) DENIES
12 Starwood's motion to dismiss for failure to sue a proper
13 defendant; (3) DENIES Starwood's motion to dismiss plaintiffs'
14 claim for negligence; (4) GRANTS Starwood's motion to dismiss
15 plaintiffs' separate claim for negligent infliction of emotional
16 distress and deems the claim part of plaintiffs' negligence
17 claim; and (5) DENIES Starwood's motion to dismiss for lack of
18 subject matter jurisdiction.

19 IT IS SO ORDERED.

20 Dated: 12/19/2005

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24 DAVID F. LEVI
25 United States District Judge
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